



Comptroller General
of the United States

Washington, D.C. 20548

145952.

Decision

Matter of: Komatsu Dresser Company

File: B-246121

Date: February 19, 1992

Matthew S. Simchak, Esq., and Geoffrey Cook, Esq., Ropes & Gray, for the protester.

William A. Roberts, III, Esq., Howrey & Simon, for Caterpillar, Inc., and Gerald J. Cardon, for Melroe Company, interested parties.

Stuart Young, Esq., General Services Administration, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in preparation of the decision.

DIGEST

1. Protest against terms of "open season" amendment to earlier General Services Administration solicitation for multiple award, Federal Supply Schedule contract is timely where filed prior to the time set for receipt of initial proposals under the amendment; as the amendment includes new requirements and solicits offers from all interested firms, it is tantamount to new solicitation for purposes of protesting its terms.

2. "Requote arrangements" clause in Federal Supply Schedule (FSS) solicitation is inconsistent with Competition in Contracting Act requirement for full and open competition, and thus is improper, since it provides for limited competition exclusively among FSS vendors for supplies in excess of maximum order limitations instead of permitting all interested firms to compete.

3. Protest of agency's determination as to appropriate federal supply classification (FSC) for certain items is denied where record shows that agency's classification is reasonable; fact that items could also be classified under other FSCs is not, in itself, sufficient basis to disturb agency determination.

DECISION

Komatsu Dresser Company protests the terms of request for proposals (RFP) No. FCAS-S3-3810-1-N-10-8-91, issued by the General Services Administration (GSA) to allow an open season for adding vendors to its multiple award Federal

Supply Schedule (FSS) for road clearing and cleaning equipment. Komatsu argues that (1) the solicitation's requote provisions improperly preclude full and open competition; and (2) GSA improperly has expanded the types of equipment vendors may offer under one of the solicitation's special item numbers (SIN) and improperly raised the maximum order limitations (MOL) applicable to this SIN.

We sustain the protest in part and deny it in part.

The solicitation, issued September 3, 1991, is an amendment to the basic FSS solicitation, RFP No. FCAS-S3-3810-N-4-10-90, issued in March 1990. The basic RFP was issued to obtain vendors for a variety of street cleaning and clearing equipment under the FSS, and contemplated the award of multiple contracts for similar equipment. Offerors were required to submit firm, fixed unit prices for an indefinite quantity of each line item for a 5-year period from 1990 to 1995. The current RFP contemplates the award of similar contracts to additional vendors for the remainder of the original 5-year period. Initial offers under the open season amendment were due on October 8.

Both the basic solicitation and the open season amendment contain three provisions that are the subject of Komatsu's protest. First, the solicitations contain MOLs limiting the dollar value of orders placed under the contracts; any given order under the contract cannot exceed \$150,000, and the value of supplies ordered under the various SINs¹ cannot exceed \$50,000, \$75,000 or \$100,000, the applicable MOL increasing as offered discounts increase. (To determine the MOL for each SIN, the agency negotiates separately with each vendor, setting the MOL higher in return for the vendors' offering of relatively higher per-unit price discounts.)

Second, the solicitations contain a "requote arrangements" clause providing that only vendors included on the FSS may compete for user agency requirements that exceed the largest MOL available from any vendor. Under the requote arrangements clause, vendors are required to quote unit prices which are at least as advantageous as the unit prices available under the schedule and may offer additional discounts for purposes of the requote. Additionally, vendors may only offer the exact products originally contracted for under the SIN and may not substitute

¹The solicitation contains a total of 11 SINs, each one representing a discrete grouping of equipment. For example, SIN No. 271-102 is for vehicular mounting winches and SIN No. 271-103 is for rider-operated street and parking area sweepers.

alternate products. After conducting a requote competition, the user agency awards a delivery order to the successful vendor under that vendor's FSS contract.

Finally, the solicitations define SIN No. 271-109, for road clearing and cleaning equipment, as including "scarifiers; beach cleaners; backhoes; front-end loaders; excavators; tractor, wheeled (20 horsepower or greater); industrial trailers for construction equipment; etc."

TIMELINESS

As a preliminary matter, GSA argues that the protest is untimely because all of the provisions Komatsu challenges were included in the 1990 basic solicitation. According to GSA, Komatsu was required to protest prior to the closing date for the receipt of proposals under the basic solicitation, and its protest filed prior to the closing date for the current solicitation is untimely. Alternatively, GSA argues that since the provisions were included in 25 contract awards under the basic solicitation, Komatsu should have diligently pursued the information contained in those contracts in order to object to those terms in a reasonably prompt manner.

We disagree with GSA. The open season amendment was issued, GSA explains, "to allow new offerors the opportunity to obtain contracts under the existing schedule," so that "participation under the schedule remains open to all responsible sources." Given this purpose, we view the amendment as tantamount to a FSS solicitation for new offerors. Just as a potential offeror on any current solicitation is not precluded from protesting its terms prior to the initial closing merely because the same objectionable terms appeared in prior solicitations or contracts, we do not think that offerors invited to compete under the amendment here are precluded from challenging the terms of the amendment prior to the deadline for submission of offers under the amendment. In other words, we see no reason why the terms of the amendment, which establish the contract terms to which these new offerors will be bound, should not be subject to protest under the same rules applicable to any other solicitation terms.

The applicable rule under our Bid Protest Regulations provides that protests based upon alleged improprieties apparent on the face of a solicitation must be filed no later than the time set for receipt of proposals. 4 C.F.R. § 21.2(a)(1), as amended by 56 Fed. Reg. 3759 (1991). Because Komatsu's protest of the terms of the amendment was received prior to the deadline for receipt of offers it is timely. See Syva Co.--Recon., B-218359.2, May 6, 1985, 85-1 CPD ¶ 503 (protest against terms of amendment issued under

earlier RFP timely because amendment effectively called for supplies or services to satisfy new agency requirements).

REQUOTE

Komatsu argues that the requote arrangements clause impermissibly limits the field of competitors in acquisitions exceeding the MOL to FSS vendors. According to Komatsu, requirements in excess of the MOL should be open to competition by any interested firms, including those such as Komatsu that do not participate in the multiple award schedule (MAS) program. The protester argues that GSA's attempt to limit the competition by means of the requote clause violates the Competition in Contracting Act of 1984 (CICA), under which all responsible sources generally must be afforded an opportunity to submit competitive bids or proposals. 41 U.S.C. § 403(6) (1988).

GSA maintains that the requote arrangements clause is consistent with CICA, noting that CICA, 41 U.S.C. § 259(b)(3), specifically states that the MAS program satisfies the Act's requirements for full and open competition, provided that (1) all responsible sources have been afforded an opportunity to compete, and (2) the contracts or delivery orders placed under the MAS result in the lowest overall cost alternative for the government. GSA asserts that the first proviso is met by the requote provision since all responsible sources are permitted to compete to become FSS vendors during either the basic solicitation or open seasons such as the one here, and thus can compete on requotes. GSA asserts that the requote process also will result in the lowest overall cost to the government, satisfying the second proviso, because offers must be at or below the vendors' lowest FSS prices, and orders may only be placed if more than one FSS contractor can be expected to compete for the requirement.

We do not agree that the requote provisions satisfy the requirements of CICA relating to the MAS program. The MAS program authority under CICA was intended to enable user agencies to acquire small quantities of commercially available goods and services with minimal administrative burdens. See H.R. Conf. Rep. No 861, 98th Cong. 2d Sess. 423, reprinted in 1984 U.S. Code Cong. Admin. News 2111. As we have noted in the past, the purpose of placing an MOL clause in an FSS contract is to enable the government to explore the possibilities of securing lower prices for larger quantities exceeding the MOL. Kavouras, Inc., B-220058.2, B-220058.3, Feb. 11, 1986, 86-1 CPD ¶ 148. Consistent with this purpose, the government may not place an order, and an FSS vendor may not accept one, where it

exceeds the MOL stated in the contract. Id.; Federal Property Management Regulations (FPMR), 41 C.F.R. § 101-26.401-4(c)(1) (1990). It follows that an FSS solicitation represents a competition for quantities up to the advertised MOL, not quantities in excess of the MOL.

Under the requote provisions in issue, award can be made to a FSS vendor for quantities in excess of the MOL despite the fact that the competition was not conducted on the basis of those larger quantities. As a result, requote competitions under these provisions would satisfy neither of the CICA provisos cited above. First, competition among firms--such as Komatsu--that did not desire to compete for a FSS contract would be precluded, so there would be an absence of full and open competition for the requirements. Second, awards under the requote procedures would not necessarily result in the lowest cost to the government; requotes would only assure the lowest cost available from schedule vendors.

GSA maintains that it is necessary to require firms to compete for MOL quantities as FSS vendors as a condition to being eligible to compete for larger orders in excess of the MOL to assure that there will be adequate competition for the MOL quantities. Absent such a "package approach," GSA asserts, contractors would compete only for the larger orders.

A package approach coupling large quantity, high dollar value requirements with small quantity, low dollar value requirements may be used where the agency's needs and the requirement's procurement history made it less desirable to acquire the two quantities separately. For example, in IVAC Corp., 67 Comp. Gen. 531 (1988), 88-2 CPD ¶ 75, we found the agency's use of a package approach unobjectionable because (1) the two combined items--intravenous solutions and intravenous administration sets--had to be compatible and therefore had to be acquired from a single manufacturer; and (2) the agency demonstrated that significant savings would result.

GSA has not demonstrated that a package approach is warranted here. While it may well be that a requote procedure would be appropriate where it is necessary to secure sources to meet the agency's needs, there has been no showing that this is the case. GSA has furnished nothing evidencing a lack of competition for MOL quantities in the past, and there is nothing else in the record that supports such a conclusion. Komatsu states that it does not desire to compete for the MOL quantities--indeed, this is the reason for its protest--but one firm's business decision is not sufficient to establish a lack of adequate competition. As GSA has noted, some 25 vendors currently hold MAS contracts under this FSC group of commodities.

GSA maintains that the requote procedure is beneficial to the government, and thus should be permitted, because the commerciality of the products available under the MAS ensures that products acquired under a requote competition will have a broader functional application than products acquired under a separate solicitation with its own narrow specifications. According to GSA, buyer agencies that acquire products under the MAS will have available the contractor's entire line of accessories and attachments for the product and will thereby be able to broaden the utility of the item purchased. GSA also maintains that the conduct of a requote acquisition further benefits the government because of the savings of administrative costs that would be incurred in conducting a separate acquisition.

GSA's arguments are unpersuasive. There is no statutory or regulatory basis for ignoring CICA's competition and low price requirements for the MAS program--which we have found are not satisfied by the requote procedures--based upon a general allegation that this will facilitate obtaining equipment with desirable features. Agencies may not justify avoiding competition requirements with unsupported assertions that administrative savings may result. See Richard M. Milburn High School, B-244933, Nov. 27, 1991, 91-2 CPD ¶ 496; 53 Comp. Gen. 209 (1973). As a practical matter, it is unclear why GSA could not obtain the commerciality and flexibility of use it desires by fashioning a specification that requires a commercial product (indeed, FAR part 11 imposes an obligation on agencies to acquire commercial products whenever such products will adequately fulfill the agency's needs), or otherwise describes the equipment in a manner similar to that in the FSS.

We conclude that the requote provisions in the RFP do not satisfy the CICA competition requirements and therefore sustain this aspect of the protest.

AMENDMENT OF SIN 271-109

Komatsu argues that GSA has improperly amended one of the SINS in the solicitation that describes the type of equipment that may be offered. The solicitation, which calls generally for Federal Supply Classification (FSC) Group 38 commodities, includes FSC 3825, "Road Clearing and Cleaning Equipment," and solicits offers for five SINS falling under FSC 3825. One of those five, SIN 271-109, "Other Road Clearing and Cleaning Equipment," is the subject of Komatsu's argument. According to Komatsu, GSA has improperly added nine heavy construction items to the list

of commodities acceptable under SIN 271-109,² because each of the items is already properly classified under another FSC code.³ Komatsu maintains that acquiring the same goods or services under more than one FSC code violates the FPMR provisions relating to the cataloging of federal supply items, which require items to be described under one four-digit FSC class. See FPMR, 41 C.F.R. § 101-30.201(b)(1) and (b)(2); Federal Catalog System Policy Manual, GSA-FSS-4130.2-M, § 331.04(a). Komatsu concludes that the nine additional heavy construction items should be removed from the RFP.

According to GSA, these items have long been contracted for under SIN 271-109, and have been described using generic names such as "backhoes" in order to apprise offerors that multiple-application equipment that is suitable for use in street cleaning and clearing will be considered by the agency for inclusion under SIN 271-109. GSA notes that many equipment manufacturers produce a base machine bearing a generic name that can be modified using various attachments, some of which will render the machine suitable for the applications contemplated under FSC 3825 and SIN 271-109. For example, GSA states that one of the current contractors under this SIN supplies an item described as a "multiple tool carrier/wheeled articulated loader." This basic machine has 16 possible attachments, some of which allow the machine to perform street cleaning and clearing functions. According to GSA, it has attempted to list some of the possible types of machines which, when properly equipped, will be acceptable under SIN 271-109. GSA notes that the commerciality and versatility of these machines will result in cost savings to the user agencies, which can simply buy additional attachments when new needs arise.

The determination of the appropriate FSC for an item is within the discretion of the procuring activity, utilizing the available guidance provided by the FPMR and the various

²The protester specifically objects to the inclusion under SIN 271-109 of the following items: wheeled articulated front-end loaders, tracked front-end loaders, tracked front-end loaders/backhoes, compaction/roller equipment, wheeled excavators, tracked excavators, trenching equipment, graders and cranes. This listing is derived from a July 3 presolicitation notice, issued by GSA, rather than the solicitation itself.

³For example, FSC code 3810 includes cutting edges, ditchers, graders, loaders, scrapers, special type earth and rock hauling trucks and trailers and structural components of these items such as bodies, cabs, and frames.

cataloging policy manuals, Hung Myung (USA) Lt., Inc;
Containertechnik Hamburg GmbH & Co., B-244686 et al.,
Nov. 7, 1991, 71 Comp. Gen. ____, 91-2 CPD ¶ 434; we will not
disturb an agency's determination in this regard unless it
lacks a reasonable basis. Id. Although in some
circumstances there may be no question as to the appropriate
classification for a particular item, some items may
appropriately be classified under more than one FSC category
and we will not overturn such classifications simply because
a category other than the one selected might also have been
chosen. Cincinnati Milacron Mktg. Co., B-237619, Feb. 27,
1990, 90-1 CPD ¶ 241.

We find that GSA's inclusion of the nine items under FSC
3825 was reasonable. We are persuaded by GSA's explanation
regarding the multiple-use nature of these items. The
record shows that many of these items, while bearing generic
names such as "front-end loaders," in fact are suitable for
performing a wide variety of operations, some of which are
clearly encompassed by the equipment described in FSC 3825.
For example, machines that may be generically described as
articulated front-end loaders are suited for the performance
of snow removal or street sweeping and cleaning when the
appropriate attachments are utilized. While we recognize
that this equipment properly can be classified under another
FSC category, we think it also reasonably can be included
under the category here. This being the case, we have no
basis to conclude that GSA's classification of the items was
improper. Cincinnati Milacron Mktg. Co., supra.⁴

MISCELLANEOUS

Komatsu alleges for the first time in its comments on the
agency report that the description of acceptable items under
SIN 271-109 is ambiguous because it is indefinite. Komatsu
asserts that this alleged ambiguity became apparent only
when it received the agency's report and understood the
agency's position regarding the description of acceptable
items under SIN 271-109. This argument is untimely. GSA's
interpretation of acceptable items under SIN 271-109 as
including what Komatsu describes as heavy construction

⁴Komatsu alleges that the agency has improperly raised the
MOLs for this acquisition--from \$100,000 to \$150,000 per
order and from \$30,000, \$40,000 or \$50,000 to \$50,000,
\$75,000, or \$100,000 per SIN--to facilitate the acquisition
of the additional items of heavy-construction equipment that
it argues have been improperly included under this
solicitation. Given our conclusion above that there is
nothing improper in the equipment included in the
solicitation, this argument is without merit.

equipment was evident from the solicitation's description of acceptable items under that SIN and was made still more explicit in the July 3 presolicitation notice. Consequently, if Komatsu considered the specification indefinite, it should have raised the matter in its initial protest. 4 C.F.R. § 21.2(a)(1), as amended by 56 Fed. Reg. 3759 (1991).

RECOMMENDATION

By letter of today to the Administrator of General Services, we are recommending that the solicitation be amended to eliminate the requote arrangements clause. We also find Komatsu to be entitled to those costs of filing and pursuing its bid protest, including attorneys' fees, related to its protest on the requote arrangements clause. 4 C.F.R. § 21.6(d)(1); Interface Flooring, 66 Comp. Gen. 597 (1987), 87-2 CPD ¶ 106.

The protest is sustained in part and denied in part.

for Milton J. Auster
Comptroller General
of the United States